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Supreme Court, U.S.
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Supreme Court of the United States

MICHELLE BAZZETTA, et al.,

Cross-Petitioners,

v.

PATRICIA L. CARUSO, Director of Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Cross-Petitioners are prevailing parties where they obtained a ruling that was not overturned on appeal that required Cross-Respondents to allow visitation between people in prison and their minor siblings, resulted in the elimination of the permanent ban on all visits for substance abuse misconducts, successfully established a fundamental Constitutional Right of Association which survives incarceration, and expanded the ability of children to visit their incarcerated parents by striking down a restriction.

II.

Whether the lower court erred in affirming the dismissal of the case and vacating Cross-Petitioners' fee award without any determination of reasonableness based upon the success achieved.

PARTIES TO THE PROCEEDING

Cross-Petitioners are Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Artur Bunton through his next friend, Valerie Bunton on behalf of themselves and others who are similarly situated, in a class comprised of incarcerated individuals, together with their family members and community advocates who challenged certain visitation restrictions by the Michigan Department of Corrections as violative of their constitutional rights.

Cross-Respondents are the Michigan Department of Corrections and its current Director, Patricia L. Caruso.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CROSS-PETITION	8
I. The Circuit Court Erred in Holding that Cross-Petitioners Were Not Prevailing Parties	8
A. Cross-Petitioners Obtained a Judicial Ruling That Was Not Overturned on Appeal, Requiring Cross-Respondents to Allow Visitation Between People in Prison and Their Minor Siblings	11
B. Cross-Petitioners' Litigation Resulted in the Elimination of the Permanent Ban on All Visits for Substance Abuse Misconducts	14
C. Cross-Petitioners' Litigation Successfully Established a Fundamental Constitutional Right of Association Which Survives Incarceration	18

TABLE OF CONTENTS – Continued

Page

D. Cross-Petitioners' Litigation Expanded the Ability of Children to Visit Their Incarcerated Parents by Striking Down a Restriction 21

II. The Circuit Court Erred in Affirming the Dismissal of the Case and the Vacating of Cross-Petitioners' Fee Award Without Any Determination of Reasonableness of Cross-Petitioners' Fees Based on the Success Achieved 23

CONCLUSION 32

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bazzetta v. McGinnis, 133 F. 2d 382 (6th Cir. 1998) 3

Bazzetta v. McGinnis, 148 F. Supp. 2d 813 (E.D. Mich. 2001) 3, 12, 22

Bazzetta v. McGinnis, 286 F. 3d 311 (6th Cir. 2002) 3, 13, 22

Bazzetta v. McGinnis, 73 Fed. Appx. 842 (6th Cir. 2003) 5, 26

Bazzetta v. McGinnis, 423 F. 3d 557 (6th Cir. 2005) 28

Bazzetta v. McGinnis, 430 F. 3d 795 (6th Cir. 2005) ..... *passim*

Beard v. Banks, 548 U.S. 521 (2006) 20

Berger v. City of Mayfield Heights, 265 F. 3d 399 (6th Cir. 2001) 24

Blum v. Stenson, 465 U.S. 886 (1984) 25

Farrer v. Hobby, 506 U.S. 103 (1992) 28

Grier v. Goetz, 421 F. Supp. 2d 1061 (M.D. Tenn. 2006) 12

Habich v. City of Dearborn, 331 F. 3d 524 (6th Cir. 2003) 25

Heiar v. Crawford County, 746 F. 2d 1190 (7th Cir. 1984) 30

TABLE OF AUTHORITIES – Continued

Page

Hensley v. Eckerhart, 461 U.S. 424 (1983) .....*passim*

Jackson v. Illinois Prison Review Bd., 856 F. 2d 890 (7th Cir. 1988) 13

Johnson v. California, 336 F. 3d 1117 (9th Cir. 2003) 20

Kelly v. Lewis, 88 Fed. Appx. 282 (9th Cir. 2004) 20

Kelly v. Metropolitan Co. Bd. of Education, 772 F. 2d 677 (6th Cir. 1985) 27

Maydak v. United States, 363 F. 3d 512 (D.C. Cir. 2004) 20

Murray v. City of Onawa, Iowa, 323 F. 3d 616 (8th Cir. 2003) 24

Nadeau v. Helgemoe, 581 F. 2d 275 (1st Cir. 1978) 9, 25

Northcross v. Board of Ed. of Memphis Schools, 611 F. 2d 624 (6th Cir. 1979).....24, 30

Overton v. Bazzetta, 537 U.S. 1043 (2002).....*passim*

Overton v. Bazzetta, 539 U.S. 126 (2003) 4, 19, 20, 21, 22

Parton v. GTE North, Inc., 971 F. 2d 150 (8th Cir. 1992) 28

Richard S. v. Dept. of Developmental Services, 317 F. 3d 1080 (9th Cir. 2003) 13

S.D. Edmonds v. FBI, 417 F. 3d 1319 (D.C. 2005) 24

TABLE OF AUTHORITIES – Continued

Page

Sole v. Wyner, 551 U.S. 74 (2007) 8

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989) 9, 10, 26

Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*

Ustrak v. Fairman, 851 F. 2d 983 (7th Cir. 1988) 28

Wayne v. Village of Sebring, 36 F. 3d 517 (6th Cir. 1994) 27

Yoder v. Wisconsin Dept. of Corrections, 2004 WL 602647 (W.D. Wis. 2004) 20

Young v. City of Chicago, 202 F. 3d 1000 (7th Cir. 2000) 13

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 1

42 U.S.C. § 1982 1

42 U.S.C. § 1983 1

42 U.S.C. § 1985 1

42 U.S.C. § 1986 1

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 1988(b) 1

42 U.S.C. § 2000d 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 15, 18, 19, 20

U.S. Const. amend. VIII 14, 16, 19

U.S. Const. amend. XIV 15

OPINIONS BELOW

On August 28, 2008, the United States Court of Appeals for the Sixth Circuit issued an unpublished opinion affirming an order vacating an award of attorney fees and judgment of dismissal of the case, addressing Cross-Petitioners' cross-appeal. Cross-Respondents filed a petition for writ of certiorari which was docketed on March 9, 2009, to which Cross-Petitioners submit this conditional cross-petition for review.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681, *et seq.*], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d, *et seq.*], or section 40302 of the Violence Against Women Act of

1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

1. Statement of Facts

These Petitions involve a dispute over attorney fees and costs at the conclusion of Cross-Petitioners' challenge to the Michigan Department of Corrections' restrictions and prohibitions on visitation between incarcerated individuals and their family and friends. In 1995 the Michigan Department of Corrections announced a series of severe restrictions on visitation with people in prison. The rules were greeted with widespread public opposition, based on the punitive nature of the restrictions and the negative impact on rehabilitation and recidivism. A class of incarcerated individuals, together with their family members and community advocates, were certified as a class to challenge the restrictions as violative of their constitutional rights.

Following lengthy pretrial litigation, including two opinions by the Court of Appeals for the Sixth Circuit, the Plaintiff class prevailed on all issues after

several weeks of a bench trial.[1] The District Court held that the visitation regulations and policies violated Cross-Petitioners' constitutional rights and found the process by which Cross-Respondents had implemented the permanent ban also violated Cross-Petitioners' procedural due process rights. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 858 (E.D. Mich. 2001). The District Court's decision was affirmed on appeal in its entirety and Cross-Respondents' request to stay the remand, requiring the reinstatement of all visitation, while they sought review by this Court was denied by both the Circuit Court and this Court. *Bazzetta v. McGinnis,* 286 F. 3d 311 (6th Cir. 2002).

Upon remand, the District Court reinstated visitation between Cross-Petitioners in prison and their siblings, children, nieces and nephews. The District Court also lifted the permanent visitation bans that had been imposed on Cross-Petitioners without adequate due process, allowing those in prison and their family members to visit for the first time in seven years. The District Court also barred

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[1] Respondents initially obtained a Temporary Restraining Order preventing the visitation restrictions from taking effect. Respondents thereafter lost a preliminary injunction hearing as to the restrictions on contact visits. The Court of Appeals affirmed in part but remanded for a ruling on whether Petitioners' restrictions, as applied to non-contact visits, were violative of Respondents' rights and for determination of the constitutionality of Petitioners' permanent ban on all visits for people in prison with substance abuse problems. *Bazzetta v. McGinnis*, 133 F. 2d 382 (6th Cir. 1998). The parties went to trial on these issues in 2001.

future implementation of the challenged visitation restrictions. Cross-Respondents' attempt to stay this order was denied by both the Circuit Court and this Court, on May 16, 2002. All Cross-Petitioners (both those who were incarcerated and their hopeful visitors) who had been permanently banned from visiting each other because of the Michigan Department of Corrections' policy of permanently banning all visits if a person in prison was found guilty of two substance abuse tickets – which included possession or use of alcohol, over the counter drugs or illegal substances – had their visits reinstated. This relief was permanent as the Court of Appeals' ruling that a permanent ban was unconstitutional under the procedure that existed prior to 2002, was never reversed. The result was the permanent lifting of over one thousand permanent visitation bans that had been placed on class members since 1995. Order For Payment of Interim Attorneys Fees, June 27, 2002, Pet. App. 35a-36a.

Thereafter, this Court granted Cross-Respondents' petition for certiorari limited to certain issues, *Overton v. Bazzetta*, 537 U.S. 1043 (2002). This Court did not grant certiorari on either the facial or as applied procedural due process ruling, reversed on the issues that were considered by this Court, and remanded for further proceedings in conformity with the opinion. *Overton v. Bazzetta*, 539 U.S. 126 (2003), *reh'g denied*, 539 U.S. 982 (2003).

After this Court issued its opinion, Cross-Respondents moved for reversal of the District Court's fee

award pending before the Circuit Court and peremptory dismissal of the case below.[2] The Circuit Court denied Cross-Respondents' motion and on August 28, 2003, remanded the case to the District Court for further consideration in light of *Overton*. *Bazzetta v. McGinnis*, 73 Fed. Appx. 842 (6th Cir. 2003).

On remand, the District Court reaffirmed Cross-Petitioners' status as prevailing parties in accordance with the standards established by *Hensley v. Eckerhart,* 461 U.S. 424 (1983), holding:

> Based on this standard, it is apparent that Plaintiffs remain a prevailing party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visitation restrictions. Given the decision by the Supreme Court, however, it seems that there should be some further consideration of the reasonableness of the attorney fees previously ordered.

Opinion and Order, December 23, 2003, Pet. App. 116a-117a.[3]

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[2] The fee appeal had been stayed pending a ruling in *Overton*.

[3] On remand, Petitioners also requested that the District Court order that Respondents place the interim attorney fees in escrow. The District Court ruled that:

(Continued on following page)

Subsequent to, and in compliance with, the *Overton* decision, the Michigan Department of Corrections revised the visitation restrictions for substance abuse misconducts, deleting the permanent ban provisions and revising the procedures for future restrictions of visits. Cross-Petitioners challenged these revised rules as facially violative of Cross-Petitioners' due process rights and the District Court enjoined their implementation. Cross-Respondents appealed and the Circuit Court reversed the finding of unconstitutionality as to the facial challenge. The Circuit Court, however, did not disturb the earlier ruling or relief that lifted the permanent ban for over 1,000 prisoners based upon Cross-Petitioners' "as applied" challenge to the old rules, affirming that:

> Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship" thus implicating a protected liberty interest.

Bazzetta v. McGinnis, 430 F. 3d 795, 805 (6th Cir. 2005).

> [W]ith respect to the issue of escrow, the Court finds such a request to be untimely and unnecessary. Defense counsel missed their opportunity to request that the funds be put in escrow at the outset, and have cited no legal authority to support their argument that nearly eighteen months after the money has been paid, the Court can order it into escrow.

Opinion and Order, December 23, 2003, Pet. App. 117a. Petitioners did not appeal this ruling.

Upon remand from this ruling it remained for the District Court to determine a reasonable award of attorney fees and costs for Cross-Petitioners in light of its prior determination of prevailing party status. Cross-Respondents opposed any fees and further asked the District Court to order repayment of undisputed attorney fees paid to Cross-Petitioners in 2002. The District Court denied the request for repayment of the interim fees, and Cross-Respondents appealed.

The District Court, in the same order denying Cross-Respondents' request for repayment of interim fees, vacated in total its award of attorney fees and costs entered on August 19, 2002, subsequent to this Court's decision in *Overton*. The District Court had reaffirmed Cross-Petitioners' prevailing party status after the Supreme Court's opinion, and ordered the parties to submit briefs on the reasonableness of the Court's prior award in light of the Cross-Petitioners' reduced success. The District Court, rather than consider the reasonableness of its prior award of disputed fees in light of the partial success obtained by Cross-Petitioners in this complex litigation, simply vacated the entire fee award and dismissed the case. Cross-Petitioners cross-appealed on these issues and the Circuit Court, without any analysis and without identifying any clear error in the District Court's finding that Cross-Petitioners were prevailing parties, affirmed the dismissal and vacated the entire award, stating only that Cross-Petitioners "achieved only a transient victory in *Bazzetta II* [430 F. 3d 795]

and eventually left the courthouse empty", in reliance upon the wholly distinguishable case of *Sole v. Wyner*, 551 U.S. 74 (2007).

REASONS FOR GRANTING CROSS-PETITION

The failure to award attorney fees in this lengthy legal battle to establish recognition of fundamental rights for an ever increasing number of our citizens, undermines the purpose and value of 42 U.S.C. § 1988, warranting review and clarification by this Court that the type of benefits the Plaintiff class obtained in this case render them prevailing parties entitled to attorney fees. In the event the Court grants Certiorari to the Cross-Respondents, Cross-Petitioners ask the Court to also grant review on the issues Cross-Petitioners include herein, because these issues are intertwined.

I. The Circuit Court Erred in Holding that Cross-Petitioners Were Not Prevailing Parties

The proper standard for determining whether Cross-Petitioners are a prevailing party was addressed by the District Court in its August 19, 2002 opinion, finding Cross-Petitioners to have met the threshold:

> [T]he *Hensley* Court indicated that "[a] typical formulation is that Plaintiffs may be

> considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978).

Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 48a.

The District Court also relied upon *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), which rejected the argument that a plaintiff needed to prevail on a "central issue" in their lawsuit, holding that:

> If the plaintiff has succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in brining the suit, the plaintiff has crossed the threshold to a fee award.

Id. at 792.

This concept of "prevailing party" is to be interpreted in a practical manner by inquiring whether a plaintiff obtained any benefit as a result of their litigation either in terms of monetary damages or injunctive relief. While the degree of Cross-Petitioners' success in this case was reduced by both *Overton* and the Circuit Court's ruling on the facial challenge to Cross-Respondents' revised rules, it did not undermine Cross-Petitioners' prevailing party status. After

Overton, the District Court ruled that Cross-Petitioners' remained prevailing parties, because:

> They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions.

Opinion and Order (1) Denying Defendants' Motion for Summary Judgment; (2) Granting Plaintiffs' Motion To Enforce Compliance; and (3) Denying Defendants' Motion To Place Attorney Fees in Escrow, December 23, 2009, Pet. App. 116a. As the District Court held in its post-*Overton* ruling reaffirming Cross-Petitioners' prevailing party status, "[t]he degree of the Plaintiffs' overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award". *Id.* (quoting *Texas State Teachers Ass'n, supra*). Cross-Petitioners obtained concrete benefits as a result of judicial rulings on major issues that were not reversed on appeal by any appellate ruling making them prevailing parties within the meaning of § 1988, to wit:

A. Cross-Petitioners Obtained a Judicial Ruling That Was Not Overturned on Appeal, Requiring Cross-Respondents to Allow Visitation Between People in Prison and Their Minor Siblings

A significant issue in this case was the decision of the state Cross-Respondents to prohibit all visitation between minor siblings and their incarcerated brothers and sisters. Over half of the named Plaintiff class representatives in this case were brothers and sisters under the age of 18 who were banned from any visits with their siblings. Cross-Petitioners argued that a fundamental right of prisoners and their family was implicated and under the balancing test of *Turner v. Safley*[4] the prohibition on these visits was unconstitutional. The District Court, after performing a *Turner* analysis, found on behalf of the Cross-Petitioners, the Circuit Court affirmed on this issue and in 2002 this Court refused to stay the mandate.

The result was that on May 16, 2002, and continuing to the present the Cross-Petitioners, who had been prohibited from seeking each other – for seven years – began visiting. Thousands of prisoners and their family members have been able to visit as a result of the Cross-Petitioners' case and the Court's ruling in this matter. Cross-Respondents did not challenge this ruling before this Court and this Court's ruling in *Overton* did not disturb the District

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[4] *Turner v. Safley*, 482 U.S. 78 (1987).

Court's decision on this point. Cross-Petitioners obtained both a judgment on the merits and judicial relief and a concrete benefit.

As the District Court found in its December 23, 2003 decision reaffirming Cross-Petitioners' prevailing party status after this Court's ruling, "Plaintiffs obtained a judicial sanctioned change in the legal relationship between the parties that resulted in an actual benefit to the Plaintiffs". *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 849 (E.D. Mich. 2001) ("Plaintiffs prevailed on the merit of their claims for expanded visits for minor children" includes Cross-Petitioners' success on their challenge to Cross-Respondents' prohibition to visitation by minor siblings.); and ("Therefore the Court finds that Cross-Petitioners have prevailed in establishing the unconstitutionality of the MDOC regulations excluding minor siblings . . . "). This ruling was not reversed on appeal and minor siblings continue to visit.

Cross-Respondents have previously cited legislation enacted *after* the ruling of the District Court on this issue to argue that the issue was either mooted by the legislation or that Cross-Petitioners' success was based on a catalyst theory, therefore stripping Cross-Petitioners of prevailing party status as to this issue. Neither argument is correct. It is undisputed that the legislation, referenced by Cross-Respondents, was enacted over a month after the District Court's ruling in Cross-Petitioners' favor on this issue. *Grier v. Goetz*, 421 F. Supp. 2d 1061, 1071 (M.D. Tenn. 2006) (catalyst cases apply only where there has been

a "voluntary change and behavior *before* a court has considered and ruled on the merits of the lawsuit"); *Jackson v. Illinois Prisoner Review Bd.*, 856 F. 2d 890, 895 (7th Cir. 1988) ("[If Plaintiff] could not recover fees then any public defendant could always defeat a § 1988 fee award in a declaratory judgment case by acknowledging the violation and changing its rule to moot the case".).[5]

The Supreme Court's review in this case did not address whether prohibition of all minor siblings would meet the *Turner v. Safley* test, because Cross-Respondents did not pursue the challenge. However, Cross-Respondents' decision not to pursue it does not deprive Cross-Petitioners of prevailing party status. *Young v. City of Chicago*, 202 F. 3d 1000, 1001 (7th Cir. 2000) ("a defendant cannot defeat a plaintiffs' right to attorneys' fees by taking steps to moot the case after the plaintiff has obtained the relief he sought for in such a case mootness does not alter the plaintiffs' status as a prevailing party"); *Richard S. v. Dept. of Developmental Services*, 317 F. 3d 1080, 1088 (9th Cir. 2003) (compliance after a judicial ruling which moots the issue does not deprive Plaintiffs of prevailing party status). On this issue

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[5] *See also* the Sixth Circuit's ruling in *Bazzetta*, 286 F.2d 311, 318 n. 1 (2002) "Michigan did not make the change until after the District Court ruled and still defended their right to put on restrictions" as to the sibling issue; therefore, the Sixth Circuit went ahead and ruled in affirming the District Court on this matter.

alone, Cross-Petitioners are prevailing party and entitled to a determination of reasonable fees.

B. Cross-Petitioners' Litigation Resulted in the Elimination of the Permanent Ban on All Visits for Substance Abuse Misconducts

Cross-Petitioners challenged the state's imposition of permanent bans on all visitation for any prisoner who was found guilty of two substance abuse misconducts as violative of Cross-Petitioners' Eighth Amendment rights and substantive and procedural due process rights. Cross-Respondents began imposing these permanent bans in 1995. At the time that Cross-Petitioners received a judgment after trial, there were over one thousand prisoners and thousands of their Plaintiff family members who had not been able to see each other for over seven years because they had been placed on a permanent visitation ban.

Cross-Respondents insisted on their right to put a permanent ban on prisoners because they argued that neither people who were in prison nor their visitors had any **rights of visitation or associational rights** and, therefore, no rights were implicated by a permanent ban on all visits.

The District Court found the permanent ban to constitute an Eighth Amendment violation. Finding that it had been imposed with "a callousness that could serve as the definition of deliberate indifference", the court also struck down the ban as violating

the Cross-Petitioners' substantive due process rights and infringing on First and Fourteenth Amendments associational rights. Finally, the court found specifically as to the bans that they had been arbitrarily applied without any process for imposing them or procedure for reinstating them which violated those Cross-Petitioners', who were on a permanent ban, due process rights.

When the Circuit Court affirmed, the District Court ordered over 1,000 individuals, who were on the permanent ban, to have immediate visitation. Thousands of people, husbands and wives, children, siblings, grandparents, aunts and uncles, visited for the first time in years. The Cross-Respondents' attempts to stop this order were rejected on May 16, 2002, and the visits began and the relief obtained was permanent. Cross-Petitioners have, therefore, prevailed on this issue for several reasons:

First, this Court did not grant certiorari on any of the due process rulings that formed a basis for the District Court's rulings lifting the permanent visitation bans. The status quo was that over a thousand prisoners had been permanently banned from any visits, many for seven years. After *Overton* was decided, Cross-Respondents conceded that the lifting of the permanent visitation restriction was a significant result sought and obtained by Cross-Petitioners

by a favorable judicial ruling.[6] The *Overton* Court neither reviewed nor reversed this ruling and Cross-Petitioners kept the benefits as a result of the District Court's order.

Second, Cross-Respondents never challenged the District Court's order with regard to the permanent ban to this Court. Cross-Respondents argued for a limited ban that would be subject to review after two years and argued that this did not constitute a violation of the Eighth Amendment. This Court, in *Overton*, addressed Cross-Respondents' argument and,

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[6] Petitioners conceded this at a hearing after remand, following *Overton*, asserting that they had limited the permanent visitation bans. Petitioners asserted,

> In addition, all of the inmates that were at issue in the third amended complaint, as facts were established by the trial before this Court, every single one of those inmates, we can – I believe the total was 1,124 but I won't take issue with the number, somewhere between 1,100 and 1,200 inmates were given the injunctive relief and the declaratory relief that they sought when this Court [] ordered us to remove them from the visitation restriction May 17, 2002.

Dec. 4, 2003 Motion Hearing. (The transcript of this motion hearing is referenced in Petitioners' Appendix, but is not complete; it does not include pages containing these quotations. Petitioners' Appendix also includes a document stricken from the record: 140a was stricken by the October 20, 2006 Order of the District Court.) Petitioners also recognized that this occurred as a result of a judicial ruling, stating: "[B]ecause here there was a declaration by the Court that what we were doing was procedurally unconstitutional, and there was an order entered requiring us to take certain conduct." *Id.*

specifically, twice, cautioned Cross-Respondents that **"if the withdrawal of all visitation privileges were permanent, or for a much longer period [than the two years Defendants proposed], or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations"**. *Overton*, 537 U.S. at 137. This Court also cautioned that if the bans were to become de facto permanent in the future, "we might reach a different conclusion" as to the constitutionality of the bans. *Overton,* 537 U.S. at 134. Cross-Petitioners obtained two very important, practical benefits as a result of the Court's ruling in this matter, that were not overturned on appeal: 1) all the permanent bans were lifted and Cross-Petitioners began visitation which continues to this day; and 2) the permanent ban is dead and this Court "admonished" Cross-Respondents (the Circuit Court's language in *Bazzetta*, 430 F. 3d at 799) that they could not re-impose a permanent ban and that the ban could not be applied in an arbitrary manner.

Third, Cross-Petitioners established a right to due process protections in visitation restrictions. After *Overton*, Cross-Respondents revised their restrictions on visits for substance abuse and proposed a two year ban with review. Cross-Petitioners again challenged, arguing Cross-Respondents had not cured the procedural due process problems found by the District Court. After the District Court enjoined the new rules, the Circuit Court held that the new rules

were not facially violative of due process but, specifically refused to accept Cross-Respondents' argument that visitation restrictions could never implicate a prisoner's due process rights, stating its ruling was without prejudice to any prisoner's right to claim that the rules as applied constituted an "atypical and significant" hardship. 430 F. 3d at 805. For all Cross-Petitioners it was clear that a fundamental right was recognized that required some procedural protections prior to lengthy visit restrictions.

C. Cross-Petitioners' Litigation Successfully Established a Fundamental Constitutional Right of Association Which Survives Incarceration

All of the above areas in which Cross-Petitioners prevailed were as a result of formal decisions by the Court and resulted in very concrete, practical relief to many Cross-Petitioners. But perhaps just as important was the basic change in the legal relationship of the parties in this case. In this case the state argued from 1995 until this case reached this Court in 2003 that there are no constitutionally protected rights associated with prisoners' visitation with their family members, including their children; that there are no associational rights; that there are no substantive or procedural due process rights; that there are no First Amendment rights; and that a permanent ban implicated no rights of people in prison. As a result of this argument, Cross-Respondents must have filed the **only civil rights brief to this Court involving**

prisoners in the last 20 years that does not reference or even cite *Turner v. Safley*.

The *status quo* and the relationship of the parties was significantly changed by the recognition that there are constitutional limits on the power of corrections officials to place restrictions on visits with prisoners. Cross-Respondents defended this case from the beginning by asserting that visitation was a privilege, and there was no basis for a court to inquire into, or restrict the Michigan Department of Corrections' regulations on visitation. Cross-Respondents argued that prisoners retained no due process rights with regard to visitation restrictions and the MDOC could restrict any or all visits, for any length of time, for any reason or no reason at all. In *Overton*, this Court accepted the existence of a constitutional right at issue and performed a detailed analysis under *Turner*, *supra*, to determine whether Cross-Respondents' infringement on Cross-Petitioners' rights was unconstitutional under the First Amendment. *Overton v. Bazzetta*, 539 U.S. at 132-36. Further, in analyzing Cross-Petitioners' Eighth Amendment claim, this Court cautioned:

> If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the

> Court of Appeals that the entire regulation is invalid.

Id. at 137. This Court rejected Cross-Respondents' assertion that their discretion to eliminate visits is boundless and unreviewable.

As the District Court found, Cross-Petitioners retained prevailing party status based on this Court's recognition of constitutional limits on prisoner visiting restrictions. *Overton* has been interpreted as affirming prisoners' fundamental right to intimate association. *Maydak v. United States*, 363 F. 3d 512, 516 (D.C. Cir. 2004) (recognizing that *Overton* confirms the proposition that prisoners retain a right of intimate association that may be curtailed under appropriate circumstances); *Johnson v. California*, 336 F. 3d 1117, 1122 (9th Cir. 2003) ("*Cf. Overton* applying *Turner* to freedom of association claims relating to family visitation".); *Kelly v. Lewis*, 88 Fed. Appx. 282 (9th Cir. 2004) ("recognizing that right to association survives incarceration", citing *Overton*); *Yoder v. Wisconsin Dept. of Corrections*, 2004 WL 602647 (W.D. Wis. 2004) ("The Supreme Court has assumed that prisoners retain some right of familiar association", citing *Overton*). This Court has extended its analysis of prisoners' associational rights to another First Amendment protected right, in *Beard v. Banks*, 548 U.S. 521 (2006) (a challenge to a ban on high security prisoner's access to newspapers, magazines, and photographs).

D. Cross-Petitioners' Litigation Expanded the Ability of Children to Visit Their Incarcerated Parents by Striking Down a Restriction

Cross-Petitioners also challenged the state policy that limited who could bring minor children to visit their incarcerated parent. The question was one of great practical significance. The District Court found that the limitation placed by the Cross-Respondents was arbitrary, implicated a fundamental right of association between a parent and her or his child, and did not meet the *Turner* standard. The Circuit Court affirmed, stating that the "justification of this policy is weak, but the harm done is readily apparent". Cross-Respondents did not pursue this ruling on appeal to this Court, and this Court specifically adopted Cross-Petitioners' urged, expanded interpretation that a child may visit when accompanied by the broader universe of adults which included, "an adult who is an immediate family member of the child or of the inmate". *Overton*, 539 U.S. at 130.[7] These visits also began on May 16, 2002, and continue to this date.

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[7] Petitioners acknowledged in argument before this Court that absent this ruling, a child's biological father could not bring the child to visit the child's incarcerated mother and Defendants argued below that only parents or spouse of the prisoner could bring the child. Transcript of Oral Argument, March 26, 2003 (U.S. Docket No. 02-94) at 14-16.

Cross-Petitioners were thus successful in expanding the opportunity for visits between prisoners and their children by broadening application of the term "immediate family", an issue the District Court found to be of "great practical significance" to class representatives, such as Tamara Prude, an incarcerated single mother, and all others similarly situated. Under Cross-Respondents' policy prior to Cross-Petitioners' lawsuit and the judicial ruling on this issue, a child's biological father, if not married to the incarcerated mother, was not able to bring the child to visit his or her mother. The District Court struck down this rule, *Bazzetta*, 148 F. Supp. at 833, n. 30, and this Court affirmed, recognizing that the limited number of adults who could bring a child to visit her or his incarcerated parent under Cross-Respondents' scenario would constitute for many prisoners a complete, "ban on visits from their children". *Bazzetta*, 286 F. 3d at 320-21.

This Court adopted an expanded rule that a child may visit when accompanied by a broader universe of adults which included "an adult who is an immediate family member of the child *or* of the inmate", thus allowing Cross-Petitioners' children to be brought by their biological father. *Overton v. Bazzetta*, 539 U.S. at 130 (emphasis added). This Court's decision to interpret the rule more broadly to include immediate family members of both the prisoner and the child has allowed Cross-Petitioners such as Tamara Prude and her minor child to visit again. The *Overton* decision has provided significant relief that would not

have occurred but for Cross-Petitioners' litigation and the rulings of the Courts.

II. The Circuit Court Erred in Affirming the Dismissal of the Case and the Vacating of Cross-Petitioners' Fee Award Without Any Determination of Reasonableness of Cross-Petitioners' Fees Based on the Success Achieved

The Circuit Court's decision, asserting that Cross-Petitioners "essentially left the courthouse empty" is completely at odds with the factual reality in this case. If left to stand, the decision seriously undermines the value of § 1988, the purpose of which is precisely to encourage the bringing of cases just like this one. This is a case which addressed arbitrary and unnecessarily harsh and severe restrictions on incarcerated people that had an actual negative impact on the penological goals of rehabilitation and the society at large. The entire sub-class of Cross-Petitioners' siblings continue to visit today, not because of Cross-Respondents' largesse, but because of a ruling that was never overturned, and, indeed, never really challenged on appeal. Thousands of Respondent prisoners and Respondent family members were reunited after denial of visits based on a permanent ban that was voided by the District Court and never reinstated. Children can now visit their incarcerated mothers by being brought by their father. This only occurred by this litigation and its related judgments. Although overturned in part, it

sufficed to significantly change the legal relationship between the parties.

Cross-Petitioners, as the District Court found, meet the threshold for being considered a "prevailing party" within the meaning of 42 U.S.C. § 1988. The question remains as to what fees are reasonable in light of the degree of Cross-Petitioners' success in this lengthy, multi-issued and procedurally complex class litigation. *Northcross v. Board of Ed. of Memphis Schools*, 611 F. 2d 624, 636 (6th Cir. 1979) (once a plaintiff is determined to be a prevailing party they are entitled to recover attorney fees for all time reasonably spent on the matter, including hours expended on unsuccessful research or phases of the litigation unless the positions asserted are frivolous or in bad faith); *Murray v. City of Onawa, Iowa,* 323 F. 3d 616, 619 (8th Cir. 2003) (plaintiff who sought $500,000 in damages and received an award of $1 was prevailing party entitled to attorney fees where he obtained some relief, significant legal issues were involved and the litigation had a public goal); *S.D. Edmonds v. FBI*, 417 F. 3d 1319 (D.C. 2005) (reversing a district court's denial of fees to plaintiffs by noting that plaintiffs' success in obtaining an order to expedite a response to an FOIA request amounted to a "judicially sanctioned change in the legal relationship of the parties", entitling plaintiffs to prevailing party status).

Once Cross-Petitioners were determined to be prevailing parties, the District Court was required to award attorney fees, in the absence of finding special circumstances. *Berger v. City of Mayfield Heights*, 265

F. 3d 399, 406 (6th Cir. 2001). Based upon the Court's rulings, Cross-Petitioners obtained a judicially sanctioned change in the legal relationship between the parties that resulted in an actual benefit to Cross-Petitioners and are therefore prevailing parties. *Habich v. City of Dearborn*, 331 F. 3d 524, 525, 534-35 (6th Cir. 2003). Once determined a "prevailing party", the district court must then apply certain principles to determine what fee is "reasonable". *Hensley v. Eckerhart*, 461 U.S. at 433; *Blum v. Stenson*, 465 U.S. 886, 888, 893 (1984) (in awarding or denying attorney fees the court should provide a clear and concise explanation of its reasons).

After the initial trial and decision on appeal from this Court, the District Court considered Cross-Petitioners' motion for attorney fees for work performed from 1995 through May of 2002. The District Court first considered whether Cross-Petitioners were prevailing parties pursuant to 42 U.S.C. § 1988. The District Court, relying upon *Hensley v. Eckerhart*, noted that:

> In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purpose if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning in

> Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee awarded *vel non*." *Id.* at 793.

Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 48a.

In its 2002 order, the District Court found that Cross-Petitioners were prevailing parties within the meaning of 42 U.S.C. § 1988 and applied the appropriate factors to determine what would constitute a reasonable fee. Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 51a-54a. After considering the twelve "Johnson factors" and performing a detailed analysis of Cross-Respondents' objections, the District Court awarded Cross-Petitioners' counsel fees and costs totaling $570,167.35. *Id.* 54a-58a. Cross-Respondents appealed and, after the Supreme Court issued *Overton*, this Court remanded the prevailing party question back to the District Court for its consideration in the first instance. *Bazzetta v. McGinnis*, 73 Fed. Appx. 842 (6th Cir. 2003). The parties again briefed the prevailing party issue in light of *Overton*. On December 23, 2003, the District Court reaffirmed Cross-Petitioners' prevailing party, holding:

> Based on this standard [*Hensley*], it is apparent that Plaintiffs remain a prevailing

> party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions. Given the decision by the Supreme Court, however, it seems there should be some further consideration of the reasonableness of the attorney fees previously awarded. This issue must be briefed before the Court can rule.

Opinion and Order, December 23, 2003, Pet. App. 116a-117a.

Pursuant to the District Court's order, Cross-Petitioners submitted a memorandum on the reasonableness of the prior fee award with proposed reductions of hours for distinct time spent on issues on which Cross-Petitioners did not ultimately prevail. Cross-Petitioners addressed the fact that the case involved a "common core of facts" or were based on "related legal theories" and spoke to the significant relief obtained. *Kelly v. Metropolitan Co. Bd. of Education*, 772 F. 2d 677 (6th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986) (where the relief obtained arose out of a common core of facts or a challenge to a centralized policy or action, the overall result is the primary factor in determining counsel fees); *see also Wayne v. Village of Sebring*, 36 F. 3d 517, 532 (6th Cir. 1994).

Cross-Petitioners addressed the fact that thousands of prisoners and their families were reunited in

visits as a result of this litigation, providing a rehabilitative benefit that neither Cross-Respondents nor the Courts disputed. *Parton v. GTE North, Inc.*, 971 F. 2d 150, 155-56 (8th Cir. 1992) (a legal issue of some significance that advances the public purpose will support the reasonableness of fees); *Farrar v. Hobby*, 506 U.S. 103, 121-22 (1992) (O'Connor, J., concurring) (a victory that vindicates important rights or deters future violations is an issue that can be considered by the Court in evaluating the reasonableness of fees). Cross-Petitioners also addressed the issue of the time and costs spent on the case necessary to achieve these results. *Ustrak v. Fairman,* 851 F. 2d 983, 988-89 (7th Cir. 1988) (the question is how much time would have been expended by plaintiffs' counsel if they had only sued on their successful claims).

However, neither the District Court nor the Circuit Court undertook any analysis of the continued reasonableness of the prior fees and costs award for work performed from 1995 through May, 2002. Nor did the lower courts address Cross-Petitioners' supplemental fees and costs submitted for subsequent work through 2006. Rather, the District Court, despite its holding that Cross-Petitioners remained prevailing parties, vacated its prior order and, without allowing oral argument, stated:

> Given the decision by the Supreme Court in *Overton* and the Sixth Circuit's decision holding the [sic] there was no facial procedural due process violation, *Bazzetta v.*

> *McGinnis*, 423 F. 3d 557 (6th Cir. 2005), this Court vacates its August 19, 2002 Order awarding Plaintiffs additional attorney fees in the amount of $570,167.35.

Order Denying Defendants' Request to Vacate June 27, 2002 Order For Payment of Interim Attorney Fees; Granting Defendants' Request to Vacate August 19, 2002 Order Granting Plaintiffs' Motion for Attorney Fees; and Vacating August 19, 2002 Order Granting Plaintiffs Attorney Fees, November 20, 2006, Pet. App. 13a-14a. However, the District Court had already ruled, **after** *Overton,* that Cross-Petitioners retained their prevailing party status. Opinion and Order, December 23, 2003, Pet. App. 116a-117a.

The only event that occurred after this was the Circuit Court's ruling on Cross-Petitioners' facial challenge to Cross-Respondents' revised rules. *Bazzetta*, 430 F. 3d 795. This ruling did not deprive Cross-Petitioners of prevailing party status because the District Court recognized, following *Overton*, that Cross-Petitioners met the threshold for prevailing party status by prevailing on "injunctive relief, expanded visits for minor children and recognition of constitutional limits on prisoner visitation restrictions". Opinion and Order, December 23, 2003, Pet. App. 116a-117a. The Circuit Court's 2005 decision also did not impact Cross-Petitioners' legal and actual success when it considered the as applied due process challenge to the former "permanent ban" rules that resulted in the lifting of Cross-Petitioners' visitation

bans. *Bazzetta*, 430 F. 3d at 805. While the District Court has a great deal of discretion in determining the reasonableness of fee awards, it is required to articulate a clear explanation setting forth its reasons. The Circuit Court clearly erred in affirming the District Court's ruling, again, without any analysis. *Hensley*, 461 U.S. at 437.

Courts have interpreted *Hensley's* requirement to require "some indication of how it arrived at the amount of compensable hours to allow for meaningful review", rejecting "meat-ax approaches" and remanding where a court fails to adequately articulate its reasons. *Heiar v. Crawford County*, 746 F. 2d 1190, 1204 (7th Cir. 1984), *cert. denied,* 472 U.S. 1027 (1985). In vacating the district court's decision to simply cut a fee request in half without articulating which parts were excessive, Judge Posner noted, "[w]here as in this case the request is for a large amount of money the judge . . . has to make a judgment – considering the nature of the case and the details of the request, taking evidence if need be, and defending [her] judgment in a reasoned (though brief) opinion on what the case should have cost the party who submitted the request". *Id.*; *see also Northcross v. Bd. of Education*, 611 F. 2d at 637. The District Court's one-time explanation does not suffice to explain its wholesale reduction of Cross-Petitioners' fee award after it had reaffirmed Cross-Petitioners' prevailing party status in light of *Overton*. *Hensley v. Eckerhart*, 461 U.S. 424, 235 (1993) (once a party prevails, a district court should not reduce hours

because a prevailing party did not receive the type or all of the relief originally requested).

Once the District Court determined Cross-Petitioners to have crossed the threshold of prevailing party status, under *Hensley* it "must apply certain principles to determine what fee is reasonable". This, the District Court wholly failed to do. Instead, it simply vacated its fee opinion of August 2002, without explanation, and did not address any fees past 2002. This, Cross-Petitioners believe, is in error.

This case has been pending for fourteen years. There are over 430 docket entries at the District Court, there was a preliminary TRO and injunctive hearing before the Court; there were nine days of bench trial; there have been eleven appeals filed by the state before the Circuit Court; there have been four certiorari petitions filed to date, with one granted. There should at least be an explanation from the District Court limiting Cross-Petitioners' total fees to only those nondisputed interim fees that Cross-Respondents agreed to pay in June of 2002 and vacating all costs awarded. This matter should be remanded to the District Court to follow law and determine what fees are reasonable in light of the success Cross-Petitioners obtained in this case.

CONCLUSION

The courts below erred by finding that Cross-Petitioners were not prevailing parties where they obtained a ruling that was not overturned on appeal that required Cross-Respondents to allow visitation between people in prison and their minor siblings, resulted in the elimination of the permanent ban on all visits for substance abuse misconducts, successfully established a fundamental Constitutional Right of Association which survives incarceration, and expanded the ability of children to visit their incarcerated parents by striking down a restriction as to whom may bring the child to visit. Thus it was error for the Court of Appeals to affirm dismissal of the case and vacating Respondent's Attorneys Fee award without any determination of reasonableness based upon the success achieved.

Cross-Petitioners request that, in the event that Cross-Respondents' petition for a writ of certiorari is granted, that the Court include the issues raised in this conditional cross-appeal because they are interrelated.

Respectfully submitted,

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No. 08-1345

In the Supreme Court of the United States

MICHELLE BAZZETTA, et al,
Petitioners,

v

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,
Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff in a 42 U.S.C. § 1983 action who has lost on all claims as a result of a unanimous merits decision in this Court can be deemed a "prevailing party" under 42 U.S.C. § 1988(b) in order to retain disputed interim attorney fees awarded during the pendency of the litigation.[1]

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[1] Respondents object to the questions presented in Petitioners' Conditional Cross-Petition because Petitioners ultimately lost on every claim in their case, when this Court unanimously reversed the lower court decisions in their entirety, *Overton v. Bazzetta,* 539 U.S. 126 (2003), and thus Petitioners' two questions are based on a faulty premise. Sup. Ct. R. 15.2.

PARTIES TO THE PROCEEDING

Petitioners include eleven class representatives on behalf of themselves and all others similarly situated, including all inmates incarcerated by Michigan Department of Corrections (MDOC) and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

Respondents are the Michigan Department of Corrections (MDOC) and the Director of the MDOC. Respondent Patricia L. Caruso is the current Director; under Sup. Ct. R. 35.3 she is automatically substituted as a party in place of the former Director, Kenneth McGinnis.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITIONER BAZZETTAS' CONDITIONAL CROSS-PETITION 4

I. The litigation did not achieve success and the complaint was dismissed with prejudice. 4

A. Petitioners did not prevail on visitation with minor siblings. 5

B. The visitation ban for substance abuse misconducts continues to be enforced by MDOC today. 7

C. Petitioners did not establish a fundamental constitutional right of association in this case 10

D. Petitioners' statement concerning MDOC's policy about minor children visiting incarcerated felons is inaccurate. 12

II. The Petitioners are not prevailing parties as a matter of law. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Bazzetta v. McGinnis,
(unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008) 3

Bazzetta v. McGinnis,
(unpublished order, E.D. Mich. No. 95-73540, November 20, 2006) 2

Bazzetta v. McGinnis,
148 F. Supp. 2d 813 (E.D. Mich. 2001) 1

Bazzetta v. McGinnis,
286 F. 3d 311 (6th Cir., 2002) 1

Bazzetta v. McGinnis,
423 F. 3d 557 (6th Cir. 2005) 2

Bazzetta v. McGinnis,
430 F. 3d 795 (6th Cir. 2005) 2, 8, 16

Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,
532 U.S. 598 (2001) 5, 6, 15

Garcia v. Yonkers School District,
561 F.3d 97 (9th Cir. 2009) 7

Overton v. Bazzetta,
539 U.S. 126 (2003) ..... passim

Sole v. Wyner,
551 U.S. 74 (2007) 14

Statutes

42 U.S.C. § 1983 i
42 U.S.C. § 1988 ..... passim
Mich. Comp. Laws Ann. 791.268a 5, 15

Other Authorities

Public Act 8 of 2001 ..... 6, 15

Rules

Mich. Admin. Code 791.6609 ..... 5, 13
Sup. Ct. R. 15.2 i
Sup. Ct. R. 35.3 ii

STATEMENT OF THE CASE

This is a fourteen-year-old controversy brought by incarcerated felons and their visitors (Petitioners) against Michigan prison officials (Respondents) challenging prison visitation restrictions. The Petitioners initially achieved some injunctive relief from the District Court and the Court of Appeals,[2] but ultimately lost on every claim. In *Overton v. Bazzetta*, this Court unanimously reversed the Court of Appeals and held that the challenged prison visitation restrictions did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution.[3]

After further proceedings in the District Court and the Court of Appeals, a judgment dismissing the case with prejudice was entered on November 20, 2006. In response to this Court's unanimous decision on August 28, 2003, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 findings of fact and conclusions of law, *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001), and remanded the case to the District Court for further consideration in light of this Court's opinion. Pet. App. 59a-60a. Despite this Court's unanimous decision in *Overton*, the District Court issued an opinion and order on December 23, 2003 agreeing with the Petitioners' claim that MDOC's visitation restriction for inmates found guilty of substance abuse misconduct violated the procedural Due Process Clause of the Fourteenth Amendment, and held that Petitioners' claim was still

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[2] *Bazzetta v. McGinnis*, 286 F. 3d 311 (6th Cir. 2002).

[3] *Overton v. Bazzetta*, 539 U.S. 126 (2003). Rather than repeat the lengthy and complex procedural history in this case, Respondents rely on the factual and procedural background set forth in *Overton, supra*.

valid. Pet. App. 102a-118a. The Respondents appealed and the Court of Appeals reversed *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005). On November 28, 2005, the Court of Appeals issued an amended opinion, *Bazzetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed the Petitioners' procedural due process claim. The Petitioners' petition for writ of certiorari was denied by this Court on October 10, 2006. Pet. App. 137a.

After this Court denied certiorari, on October 31, 2006, the Respondents filed in the District Court a motion for entry of judgment on the basis that all of the claims at issue in the Petitioners' third amended complaint had been decided in favor of the Respondents. On November 20, 2006, the District Court granted the Respondents' motion for entry of judgment, and on that same day the District Court issued a judgment dismissing the case with prejudice. Pet. App. 151a. The Petitioners did not appeal the dismissal of their case with prejudice. Thus, the end result is that the Petitioners lost on the merits of every claim.

During the pendency of the litigation—after the Court of Appeals opinion in 2002 but before this Court ultimately granted certiorari and unanimously reversed in 2003—the District Court, over the Respondents' objection, granted interim attorney fees to the Petitioners' counsel and ordered immediate payment. Subsequently, after the merits of all claims had been finally resolved against the Petitioners, the District Court denied the Respondents' request to vacate the award of interim fees that had already been paid.[4] On appeal, the Court of Appeals declined to determine

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[4] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet. App. 10a-14a).

whether the Petitioners were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision declining to order a return of the attorney fees. [5]

In No. 08-1213, the Respondents filed a petition seeking review of the question whether the Petitioners are entitled to retain attorneys fees when they are not prevailing parties under 42 U.S.C. § 1988(b). The Petitioners did not file a brief in opposition to that petition. Instead they filed the present cross-petition, No. 08-1345, asserting, in essence, that despite the ultimate dismissal of their complaint in its entirety, they nevertheless achieved some success during the lengthy litigation so they are entitled to retain the interim attorney fees awarded during the course of the litigation.

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[5] *Bazzetta v. McGinnis*, (unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet. App. 1a-9a.).

REASONS FOR DENYING PETITIONER BAZZETTAS' CONDITIONAL CROSS-PETITION

In their Conditional Cross-Petition, Petitioners claim that they prevailed on four issues that were before this Court in *Overton, supra.* As set forth below, based on this Court's unanimous reversal of the lower court decisions in their entirety, Petitioners are not prevailing parties and, thus, they are not entitled to any attorney fees. 42 U.S.C. § 1988(b).

I. The litigation did not achieve success and the complaint was dismissed with prejudice.

Despite the fact that in the ultimate disposition of the case their complaint was dismissed in its entirety, the Petitioners point to four "rulings" that they assert were not overturned on appeal, which allow them to be considered prevailing parties in this case, and thus, entitled to retain disputed attorney fees pursuant to 42 U.S.C. § 1988(b). The Petitioners' assertions, however, ignore important facts and are based on inaccurate statements of the record and court rulings.[6] Nothing in the record of this case supports their contention that they are prevailing parties. They are not entitled to retain the disputed interim attorney fees.

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[6] After this Court's unanimous reversal on the merits, *Overton, supra*, on July 9, 2003, Petitioners filed a Petition for Rehearing wherein they asked this Court to revisit these same issues, with the exception of the permanent ban for substance abuse misconducts. Opp. App. pp 1b-10b. This Court denied the Petition for Rehearing on August 23, 2003. Opp. App. p 11b.

A. Petitioners did not prevail on visitation with minor siblings.

The Petitioners' principal contention is that because of their actions, MDOC must "allow visitation between people in prison and their minor siblings." Conditional Cross-Petition, p 11. In 1995, when this litigation began, minor siblings (under 18 years of age) were not included in the list of permissible visitors. That changed in 2001, not as a result of the litigation, but by the action of the Michigan Legislature in passing Mich. Comp. Law 791.268a, which permits the MDOC to add minor siblings to a prisoner's approved visitor list. That was the situation in 2003 as this Court recognized in *Overton v. Bazzetta*, 539 U.S. at 129: "Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. Mich. Admin. Code 791.6609(2)(b); Mich. Comp. Laws Ann. 791.268a (West Supp. 2003)." This change in the law was a voluntary act by the Michigan Legislature and does not make the Petitioners prevailing parties.[7]

Petitioners argue that they should be given prevailing party status because this change in legislation occurred after the ruling of the District Court. Thus, Petitioners are attempting to revive the "catalyst theory" as a method of recovery of attorney fees with regard to minor siblings visitation. Cross-Petition, p 11. But this Court held in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, that regardless of when the voluntary change occurs, Petitioners cannot recover attorney fees based on "a

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[7] See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 610 (2001).

defendant's voluntary change in conduct."[8] In *Buckhannon,* this Court held that a voluntary change in conduct is insufficient to establish prevailing party status:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.[9]

Thus, in *Buckhannon*, this Court ruled that there must be an alteration of the legal relationship of the parties—i.e. that unless a party obtains a judgment on the merits or a court-ordered consent decree, they are not a prevailing party.[10]

Here, the Petitioners claim credit for having prevailed with regard to the issue of whether minor siblings have a constitutionally protected right to prison visitation. However, the Michigan Legislature voluntarily amended the prison visitation rules to allow minor siblings of an inmate to participate in prison visitation. Public Act 8 of 2001, Mich. Comp. Laws 791.268a. There is no dispute in this case that the Michigan Legislature voluntarily chose to amend the prison visitation rules to allow minor siblings to visit. Regardless of when this change occurred, Petitioners

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[8] *Buckhannon Board,* 532 U.S. at 605.

[9] *Buckhannon Board,* 532 U.S. at 605.

[10] *Buckhannon Board,* 532 U.S. at 600.

cannot establish that the amendment was the result of an alteration in the legal relationship of the parties."[11] Petitioners cannot point to any "court-ordered consent decree" and it was Respondents who obtained a judgment on the merits on November 20, 2006. Pet. App. 151a. Thus, because there was no corresponding alteration in the legal relationship of the parties with respect to minor sibling prison visitation, the Petitioners were not the prevailing parties on this issue.[12]

B. The visitation ban for substance abuse misconducts continues to be enforced by MDOC today.

The Petitioners next claim that they prevailed with respect to the permanent ban for substance abuse misconducts. Petitioners attempt to support this claim by pointing out that during certain points in this fourteen-year-long litigation, Respondents were under the District Court's temporary injunctive order, that prohibited them from enforcing the ban. Conditional Cross-Petition, p 16. However, the significant point here is that this Court affirmed the Respondents' right to impose a ban on visitation for substance abuse misconducts in *Overton*, 539 U.S. at 130, 135:

> The Department's revised policy also sought to control the widespread use of drugs and alcohol among prisoners. Prisoners who commit multiple substance-

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[11] *Buckhannon Board*, 532 U.S. at 610.

[12] *See, Garcia v. Yonkers School District*, 561 F.3d 97, 108 (9th Cir. 2009). "Accordingly, the School District's voluntary change in behavior cannot serve as the basis for conferring prevailing party status to the Students for purposes of granting attorney fees."

> abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. Rule 791.6609(11)(d).
>
> Drug smuggling and drug use in prison are intractable problems. See, *e.g.*, *Bell*, *supra*, at 559; *Block*, *supra*, at 586—587; *Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.

In spite of this Court's decision, Respondents were required to litigate the procedural due process issue again on remand. The Petitioners' claim that this Court did not address the due process issue when it granted certiorari is wrong. Conditional Cross-Petition, p 15.[13] The due process issue was also the subject of an appeal to the Sixth Circuit Court of Appeals. After briefing and argument, the Court of Appeals determined that this Court previously ruled that the substance abuse visitation restriction did not implicate a liberty interest under the Due Process Clause. Consequently, Petitioners lost on their claim that this Court did not address "any of the due process rulings" of the lower courts.[14] Conditional Cross-Petition, p 15. In addition, in spite of Petitioners' attempt to limit *Overton, supra,* by asserting that the District Court's injunction against

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[13] *Overton*, 539 U.S. at 131-132.

[14] *Bazzetta v. McGinnis*, 430 F.3d 795, 805 (6th Cir. 2005), cert. den. 549 U.S. 952 (2006); Pet. App. 137a.

a permanent ban was not before this Court, Conditional Cross-Petition, p 17, this Court specifically upheld MDOC's right to enforce the visitation ban for substance abuse misconducts regardless of the fact that it *may* be a permanent ban:

> An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. Rule 791.6609(12). Reinstatement is within the warden's discretion.
>
> * * *
>
> Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons.[15]

Petitioners attempt to support their claim that they prevailed as to visitation ban for substance abuse misconducts by using a limited quote from this Court and misstating this Court's holding in *Overton*. Conditional Cross-Petition, p 17. However, a review of the full paragraph from this Court's *Overton* decision established Respondents' right to enforce the visitation restriction as written:

> The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances

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[15] *Overton*, 539 U.S. at 131-132.

> of this case, fall below the standards mandated by the Eighth Amendment."[16]

Thus, a fair reading of this Court's decision in *Overton* establishes that Petitioners did not prevail on their claim that "all permanent bans" were lifted and that the visitation restriction "is dead." Conditional Cross-Petition, p 17.

Finally, whether MDOC modifies the visitation ban for substance abuse misconducts in the future is irrelevant. The relevant issue before this Court was whether MDOC had the right to impose this ban under the First, Eighth and/or Fourteenth Amendments. As set forth above, this Court upheld MDOC's right to impose their visitation restriction for substance abuse misconducts as it was written. *Overton,* 539 U.S. at 131-132. Thus, the Petitioners did not prevail on their claim that Respondents' substance abuse visitation restrictions violated the Due Process Clause.

C. Petitioners did not establish a fundamental constitutional right of association in this case.

The Petitioners' third claim, Conditional Cross-Petition, p 18, that they are prevailing parties because they "established a fundamental constitutional right of association which survives incarceration," is not supported by the decision in *Overton,* because Respondents did not argue that MDOC's "discretion to eliminate visits is boundless and unreviewable." Conditional Cross-Petition, p 20. This case did not establish such a right; to the contrary, this Court

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[16] *Overton,* 539 U.S. at 136-137.

expressly disavowed reaching that issue, *Overton*, 539 U.S. at 131-132 (citations omitted, emphasis added):

> We have said that the Constitution protects 'certain kinds of highly personal relationships.' And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents.
>
> *This is not an appropriate case for further elaboration of those matters.* The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.
>
> We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. *We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests.*

> This suffices to sustain the regulation in question.

The Petitioners' claim that they somehow prevailed on this issue is plainly wrong.

D. Petitioners' statement concerning MDOC's policy about minor children visiting incarcerated felons is inaccurate.

In their final claim of success, the Petitioners take the position that they prevailed on the issue of who can accompany a minor child to visit his or her incarcerated parent. The Petitioners' Conditional Cross-Petition asserts, at p 22, that prior to this lawsuit "a child's biological father, if not married to the incarcerated mother, was not able to bring the child to visit his or her mother." That assertion misstates the visitation guidelines and how they were implemented by Respondents, and it fails to acknowledge that Respondents continue to require that a minor child visiting an incarcerated parent must be accompanied by a family member or legal guardian of the child. Whether a biological father can accompany a child for prison visitation turns on whether that father has acknowledged paternity of that child, not whether the father is married to the mother of the child. That was the rule when this case was argued to this Court on March 26, 2003, and it is still a requirement that must

be met today.[17] The Petitioners' assertion also fails to recognize that this Court upheld Respondents' requirement, *Overton*, 539 U.S. at 133:

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[17] At p 21 n 7 of the Conditional Cross-Petition, the Petitioners cite to the oral argument transcript of *Overton v. Bazzetta*, No. 02-94, but they mischaracterize the argument there. The rule at the time, Mich. Admin. Code 791.6609(5), provided: "a child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian . . . ." During the oral argument a question was asked about an unwed father bringing a prisoner's child for a visit. Counsel for the Respondents emphasized that it is the legal relationship that matters, not the marital status, Docket No. 02-94, Transcript of Oral Argument, March 26, 2003, pp 16, 56:

> [T]he Department is permitted to insist on enough evidence to demonstrate the legal relationship.
>
> * * *
>
> QUESTION: But from respondents' argument, I had the impression that you could not have a visit from such a child, period, unless you went through some formal adoption procedure. Which is it?
>
> MR. CASEY: The--a child of a prisoner is entitled to visit if they're brought by a member of the immediate family or a legal guardian.
>
> QUESTION: Whether they're married or not married."
>
> MR. CASEY: That's correct.

> As for regulations requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Consequently, there is no factual or legal basis to support Petitioners' claim that they prevailed as to who can accompany a minor child visiting an incarcerated parent.

II. The Petitioners are not prevailing parties as a matter of law.

In their petition No.08-1213, the Respondents have presented legal arguments explaining why Petitioners, whose complaint was ultimately dismissed in its entirety with prejudice, are not prevailing parties within the meaning of 42 U.S.C. § 1988(b). In the present Conditional Cross-Petition, the Petitioners make no attempt to rebut those arguments. In addition to the numerous misstatements involving the factual findings and procedural history of this case as set forth above, the Petitioners also fail to acknowledge the relevant law concerning prevailing party status under 42 U.S.C. § 1988(b). They do not even attempt to distinguish *Sole v. Wyner*,[18] or offer any reason why its holding should not control here:

> We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under §1988(b) if the merits of the case are ultimately decided against her.

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[18] *Sole v. Wyner*, 551 U.S. 74 (2007).

As set forth more fully in the Respondents' Petition for Writ of Certiorari, No. 08-1213, the Petitioners secured a preliminary injunction, but lost on the merits when the November 20, 2006 Judgment was entered against them. No. 08-1213, Pet. App. 151a. The Petitioners lost unanimously in this Court and lost on all claims at issue in this case on the merits. They are not prevailing parties under 42 U.S.C. § 1988(b), and thus they are not entitled to any attorney fees and costs.

The Petitioners also fail to discuss this Court's decision in *Buckhannon*,[19] which abolished the "catalyst theory" as a method of recovery of attorney fees. In their Conditional Cross-Petition, the Petitioners claim credit for having prevailed with regard to the issue of whether minor siblings have a constitutionally protected right to prison visitation. However, as explained above, the Michigan Legislature voluntarily amended the prison visitation rules to allow minor siblings of an inmate to participate in prison visitation. Public Act 8 of 2001, MCL 791.268a. Based on *Buckhannon*, the Petitioners are not prevailing parties with regard to sibling visitation.

The record is clear. This Court unanimously reversed the Court of Appeals and held that the challenged 1995 visitation restrictions did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution.[20] When the Petitioners attempted to argue that a procedural due process claim was still viable after *Overton*, the Court of Appeals determined that *Overton* foreclosed their procedural due process

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[19] *Buckhannon Board*, 532 U.S. at 600.

[20] *Overton, supra.*

claim.[21] Finally, eleven years after it began, on November 20, 2006, the District Court issued a judgment dismissing the case with prejudice.

Thus, in spite of the fact that Michigan's 1995 prison visitation restrictions have been determined to be constitutional by the highest Court in our country, counsel for the Petitioners continues to hold money that rightfully belongs to the taxpayers of the State of Michigan. Therefore, the Respondents request that this Court deny the Conditional Cross-Petition in No. 08-1345 and grant the Petition for Writ of Certiorari in No. 08-1213.

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[21] *Bazzetta v. McGinnis*, 430 F. 3d 795 (6th Cir. 2005).

CONCLUSION

The Respondents respectfully request that this Court enter an order denying the Conditional Cross-Petition for Writ of Certiorari in No. 08-1345 and granting the Petition for Writ of Certiorari in No. 08-1213.

Respectfully submitted

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Dated: July, 2009

APPENDIX

TABLE OF CONTENTS

Page

I. Petition for Rehearing
Dated July 9, 2003
Overton, et al v. Bazzetta, et al
Case No. 02-94.....1b

II. Order of U.S. Supreme Court
Decided August 25, 2003
Overton, et al v. Bazzetta, et al
Case No. 02-94.....11b

No 02-94

In the
Supreme Court of the United States
October Term, 2002

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

PETITION FOR REHEARING

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NOW COME Plaintiffs and, pursuant to the Supreme Court Rule 44, petition this Honorable Court for rehearing of its decision issued on June 16, 2003 or, in the alternative, for an order clarifying the judgment.

This Court's decision concludes, without qualification or exception, that the Court of Appeals decision is reversed. However, the reasoning of the majority opinion rests on several assumptions with regard to the implementation of the challenged rules that differ from the findings made by the District Court and relied upon by the Court of Appeals in its affirmation. This Court language, reversing the Court of Appeals judgment in its entirety, might be used to argue that the challenged rules can now be applied as originally written or interpreted by Defendants, even though that would conflict with this Court's assumptions underlying its opinion. Therefore, Respondents ask this Court to grant rehearing or, in the alternative, clarify its judgment, by stating that the Court of Appeals judgment is reversed to the extent it is inconsistent with this Court decision and remanded for actions consistent with this Court's decision.

1. **Visitation by Minor Siblings.**

The first area of potential conflict concerns visitation by prisoners' siblings under the age of 18. The challenged rule prohibited visits by any minor under age 18 who was not the prisoner's child, step-child or grandchild. Thus siblings were excluded. After the District Court ruled, the Michigan legislature enacted MCL 791 .268a which states that prisoners "may be permitted" to receive visits from minor siblings. Although petitioners thereafter chose

to amend their rule to allow sibling visits, the statutory change does not require this result. In fact, Petitioners' position throughout has been that corrections officials retain absolute authority to decide who can visit prisoners "as a matter of administrative grace." (Supreme Court oral argument transcript, at 7-8) *See also* Court of Appeals decision, 286 F.3d. 311, 318 note I (6th Cir., 2002) ("As Michigan did not make this change until after the district court handed down its opinion, however, and because it still defends its right to impose this or any other restriction on visits, we address the regulation here.")

In its decision, this Court relied on the revised regulation and assumed that sibling visits are permitted. (Slip op. at 2) It repeated this assumption when it upheld the exclusion of minor nieces and nephews, expressly finding the categories of permitted visitors to be reasonable because: "Visits are allowed between an inmate and those children closest to him or her—children, grandchildren, and siblings." (*Id.* at 6, emph. added)

The District Court was faced with a rule that prohibited visits by minor siblings. It found that rule violated the First and Fourteenth Amendments. 148 F. Supp. 2d 813, 849 (E.D. Mich., 2001). The Court of Appeals affirmed this ruling. 286 F. 3d 311, 319 (6th Cir., 2002). Reversal of the Court of Appeals judgment, without exception, may be used to argue that prohibition of minor siblings' visits would now be constitutionally permissible, despite the fact that the District Court opinion is not vacated by Defendants' subsequent change of the rules, *U.S. Bank Corp. v. Bonnet*, 513 U.S. 18, 25-26 (1994); *City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 (1982).

2. Right of Intimate Association

Petitioners argued throughout that prisoners do not retain any right of association protected by the First or Fourteenth Amendments. 286 F.3d at 316-317. The District Court found that prisoners retain a constitutional right to intimate association that may be exercised through non-contact visitation. Because it found the existence of a fundamental right, the District Court proceeded to aptly the four- prong test of *Turner v Safley*, 482 U.S. 78 (1987) to determine whether Petitioners' visiting regulations impermissibly impinged upon the exercise of those constitutional rights. The District Court found that the regulations did not meet the *Turner* test and the Court of Appeals agreed.

The first of the three questions upon which this Court granted certiorari was: "Whether prisoners have a right to non-contact prison visitation protected by the First and Fourteenth Amendments." Ultimately, this Court chose not to define the extent of the asserted right, proceeding instead to apply the *Turner* test to the challenged regulations and to reach a different conclusion on whether restrictions violated Plaintiffs' constitutional rights than the lower court had. Specifically, this Court stated:

> We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to

> legitimate penological interests. This suffices to sustain the regulation in question.

(Slip op at pg 4)

The reversal of the Court of Appeals' judgment, without express limitation, could be used to argue that prisoners do not retain any right of intimate association. Although such an interpretation would contradict the text of this Court's own decision, modifying this Court's judgment to state that "the Court of Appeals judgment is reversed to "the Court of Appeals judgment is reversed to the extent it is not inconsistent with this ruling" would provide greater clarity on this important issue.

3. Visits of Minor Children With Their Parents

A third potential area of conflict that may arise in implementing this judgment involves the identity of the adults who can bring a minor child to visit a prisoner. The challenged rule states:

> [A] child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian...

Pet. 175a, R 791.6609(5). Immediate family is elsewhere defined in the rules as the prisoner's parent, grandparent, sibling, spouse or child. R. 791.6609(9), Pet. 176a. The rule on who must accompany children is ambiguous since it does not specify whether the reference to "immediate family" is to the prisoner's immediate family, the child's immediate family, or both.

The question is one of great practical significance. A prisoner's sister, the child's aunt, would be immediate family to the prisoner but not to the child. Conversely, the child's biological father, if not married to the incarcerated mother, would be the child's immediate family but not the prisoner's.[1] The District Court struck down the rule based on the undisputed testimony of the drafter, who said the rule was intended to apply only to the prisoner's immediate family. 148 F. Supp. at 833, n. 30 (referencing testimony of Van Ochten at 6th Cir. JA 4135-4138). The Court of Appeals affirmed that holding, recognizing that the limited number of adults who could bring a child to visit its incarcerated parent under this scenario would constitute for many prisoners, "a ban on visits from their children". 286 F.3d at 320-321.

This Court upheld the rule on the assumption that a child authorized to visit may be accompanied by a broader universe of adults which included a legal guardian or "an adult who is an immediate family member of the child or of the inmate". (Slip op. at 2, emphasis added) While this Court referenced one facility's visitation operating procedure a supporting this assumption, operating procedures differ from facility to facility and do not definitively interpret the policy. Indeed, the operating procedures here illustrate the confusion created by the ambiguous rule. Some facilities limited the immediate family member

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[1] During oral argument before this Court, Petitioners' counsel confirmed that unless he was the child legal guardian, the child's biological father could *not* bring the child to visit its incarcerated mother. (Oral argument transcript, at 14-16.)

to that of a prisoner. *See e.g.*, OP-MRF-06.03.140 p. 2 *eff.* 3-1-99 ("A person under eighteen (18) may visit if" they are the child, stepchild or grandchild of the prisoner being visited and are in the company of a member *of the prisoner's immediate family* (parents, child, grandparent, stepparent ...). Others limited the immediate family member who could accompany the child to the child's immediate family member. *See e.g.*, OP-NCF-05.03.140 p. 3 *eff.* 11-3-99 ("[m]ust be accompanied by an adult immediate family member (of the child of the prisoner, but must be on the prisoner's approved list...")[2] *See also* OP-ICF-05.03.140A *eff.*, p. 2, 6-14-97. ("The mandatory escort of the prisoner's minor child, stepchild, grandchild or step-grandchild must be a parent/legal guardian or immediate family member of the minor child(ren)". *See also* 6th Cir. JA 4745, 4994, 5003.

The factual assumptions as to how the policy was interpreted and applied, on which this Court rested its decision, differ from the findings of the District Court, affirmed by the Court of Appeals. The Court of Appeals found that this rule, by requiring children to be accompanied by a legal guardian or immediate family member *of the prisoner*, unreasonably restricts visitation with the prisoner's own children. While this Court interpreted the rule more broadly, to include immediate family members of both the prisoner and the child, and thus found the restrictions not to be unreasonable, by reversing the Court of Appeals' decision *in toto*, it appears to nullify the lower court's determinations that a narrower restriction would be unreasonable. Should Petitioners

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[2] Still another operating procedure allowed minor child to visit only when accompanied by "a parent or legal guardian". OP-ECF-CPP-05.03.140 p. 3 *eff.* 7-1-99.

choose to apply the rule as originally envisioned by the drafter and understood by the lower courts, numerous children would be unable to visit their incarcerated parents.

Plaintiffs-Respondents petition this Court for rehearing on these issues to avoid confusion on remand in the implementation of this Court's judgment and proceedings related to the application of the Defendants' rules.

Plaintiffs-Respondents request that rehearing be granted or, alternatively, the judgment of this Court be modified to reflect that the lower court's rulings are reversed to the extent they are inconsistent with this Court's decision and this matter is remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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DATED: July 9, 2003

No 02-94

In the
Supreme Court of the United States
October Term, 2002

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

CERTIFICATE OF COUNSEL

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As counsel of record for Plaintiff-Appellants, I hereby certify that the Petition for Rehearing is presented in good faith and not for purposes of delay.

Respectfully submitted,

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DATED: July 9, 2003

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 25, 2003

Mr. Thomas L. Casey
Solicitor General
PO Box 30212
Lansing, M 48909

Re: William Overton, Director, Michigan Department of Corrections, et al
v. Michelle Bazzetta, et al.
No. 02-94

Dear Mr. Casey:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

William K. Suter, Clerk